IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

United States District Court
Southern District of Texas
FILED

AUG 30 2002

Michael N. Milby, Clerk

PAMELA J. PASCHAL, Individually and as Independent Executrix of the Estate of Jeffrey S. Paschal, Deceased, and as next friend of KATHLEEN PASCHAL, a minor, JENNIFER PASCHAL; MARY ANN FASSNACHT, Individually and as Personal Representative of the Estate of Edward R. Fassnacht, Deceased, and as next friend of ANNA MARIE FASSNACHT, a minor and EDWARD FASSNACHT, a minor; ROBERT EDWARD FASSNACHT; DEBORAH LOUISE MALINSKY, Individually and as Heir-at-Law of David Rutherford, Deceased; AMY BRIDGES JACOBS, Individually and as Independent Executrix of the Estate of Shawn O. Jacobs; STEVE JACOBS; SHIRLEY CHOATE; SEAN PALYO; and JEREMY YAKLIN, Plaintiffs	§	CIVIL ACTION NO. C-02-312 JURY TRIAL DEMANDED
vs.	§	
KAYDON CORPORATION; THE ARMOLOY CORPORATION; ARMOLOY OF ILLINOIS, INC.; ARMOLOY OF CONNECTICUT, INC.; INVESTMENT HOLDINGS, INC.; and SIKORSKY AIRCRAFT CORPORATION, Defendants.	§	

RESPONSE TO PLAINTIFFS' MOTION TO REMAND

COMES NOW ARMOLOY OF ILLINOIS, INC., Hereinafter "ARMOLOY", Defendant in the above entitled and numbered cause, and files this Response to Plaintiffs' Motion to Remand and in support thereof respectfully shows the Court the following:

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I. BACKGROUND

This case arises from the crash of a Navy MH-53E helicopter in the Gulf of Mexico on August 10, 2000. The preliminary finding of the Navy accident investigation was that the root cause of the mishap was failure of the swashplate duplex bearing. [Exhibit A, Department of the Navy COMHELTACWINGLANT Command Investigation dated 26 Oct 00, and Department of the Navy COMNAVAIRLANT Endorsement of same dated 25 Jan 01 (collectively known as the JAGMAN Report), with selected enclosures, Endorsement Paragraph 3.] However, the reason the bearing failed is unknown. Exhibit A, Enclosure 93, Paragraph 10.

Plaintiffs have alleged general causes of action in product liability and negligence, specifically that the swashplate duplex bearing was defective and unreasonably dangerous and that Defendants "... created and/or caused the manufacturing defects, deficiencies and inadequacies in the MH-53E..." The factual basis for Plaintiffs' claims are an allegation that there is "a history of failure due to manufacturing defects that occurred both in the sizing of the bearing and in the thin dense chrome (TDC) plating applied to the bearing."

Defendant Kaydon removed this action to this court under 28 U.S.C. § 1442(a)(1), (Federal Officer Removal Statute) on the basis that Defendant Kaydon was acting under direction of federal officers of the United States in manufacturing and supplying the subject bearing to the United States. Kaydon manufactures the bearing, and Armoloy of Illinois applied the TDC plating to the bearing.

Plaintiffs have moved to remand the case.

In direct response to the Court's inquiry during the scheduling conference of August 28, 2002, Armoloy would show that evidence may be presented in support of a removal may be presented subsequent to the actual removal and may present evidence in opposition to Plaintiffs' Motion to Remand.

a. Notice of Removal Was Sufficient

In their Motion to Remand, Plaintiffs' urge that it is the removing party that bears the responsibility of establishing federal jurisdiction citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 97, 97, 42 S.Ct. 35, 37 (1921). While at the outset Plaintiffs state correctly that the removing party bears the responsibility to establish federal jurisdiction, plaintiffs incorrectly state the burden of the removing party at the time of removal. Plaintiffs' position that the marshalling of evidence necessary to ultimately prevail on such a defense is required is simply an incorrect interpretation of the law.

In their motion, Plaintiffs attempt to blur the distinction between alleging sufficient facts to support removal with the ultimate question of whether the removing defendant would be able to prevail on the defense itself.

Plaintiffs' specifically contend that removal was improper for three reasons:

(1) Kaydon's bare assertion that it is entitled to assert the government contractor defense is insufficient to confer removal jurisdiction;

(2) Kaydon cannot establish that the government contractor defense applies to the claims asserted by Plaintiffs in this case, which assert that the bearing assembly in question was defectively manufactured; and

(3) Even if Kaydon could somehow establish that the government contractor defense applies to the manufacturing defects at issue, Kaydon cannot show that its actions were taken pursuant to a federal officer's comprehensive and detailed direction.

See Plaintiffs' Motion to Remand, pg. 5.

With regard to items (2) and (3) recited above, plaintiffs' arguments are simply not a vehicle to defeat removal and are therefore not persuasive. These items would ask the court to inquire and determine at the pleading stage of the case, whether a defendant could ultimately prevail as to the merits of the defense. Such an inquiry does not come within the established analysis to determine whether the removal was proper under 28 U.S.C. § 1442.

Plaintiffs argue that Kaydon cannot meet the requirements of the Boyle defense and spend a great deal of time attempting to defeat the merits of the defense. Armoloy believes that these arguments are not properly considered at this time.

Unlike the general removal statute, § 1442 is a jurisdictional grant that empowers federal courts to hear cases involving federal officers where jurisdiction otherwise would not exist. *See Loftin v. Rush,* 767 F.2d 800, 804 (11th Cir. 1985).

For removal to be proper under § 1442, "[the federal defense alleged] need only be ***plausible***[1]; its ultimate validity is not to be determined at the time of removal." *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1427 (11th Cir. 1996), *quoting Mesa v. California*, 109 S.Ct. 959, 964 (1989)(emphasis added). Therefore the test is one of plausibility, nothing more.

The forgoing cases illustrate the correct standard created by the Supreme Court over a century ago which states that for purposes of removal, the removing party is only required to allege a colorable defense under federal law and that the "[t]he validity of the defence... is a

[1] Webster's Collegiate Dictionary 10th ed. 1996 – plausible – 1. Superficially fair, reasonable or valuable but often specious; ... 3. Appearing worthy of belief.

distinct subject. It involves wholly different inquiries...." *Id.* at 964, *quoting The Mayor v. Cooper,* 6 Wall. 247, 254, 73 U.S. 247, 254, 18 L.Ed. 851 (1868).

In addressing argument (1) of plaintiffs' motion, Armoloy agrees that § 1442(a)(1) is an exception to the general rule that prohibits removal of cases based upon federal jurisdiction unless the federal question appears on the face of a well-pleaded complaint. *Jefferson County, Ala. V. Acker*, 527 U.S. 423, 430-341, 119 S.Ct. 2069, 2074-2075 (1999). However, Armoloy disagrees with plaintiffs' argument that, notwithstanding the forgoing, the statute is to be somehow strictly interpreted.

The federal officer removal statute has a long history and was first included in an 1815 customs statute. *See H. M. Hart & H. Wechsler*, The Federal Courts and the Federal System 1147--1150 (1953). The intent of the original statute was to protect federal officers from interference by hostile state courts during the War of 1812 where federal officers were attempting to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. *Willingham v. Morgan*, 395 U.S. 402, 405, 89 S.Ct. 1813, 1815 (1969). Amended several times, during and after the civil war the primary purpose of the statute remains unchanged from its early beginnings. *Id.* Thus "[T]he test for removal should be broader, not narrower, than the test for official immunity." *Id.* The broader interpretation arises from the fact that the issues present are generally thought to be defensive in nature rather than based on the content of the Plaintiffs' claims. *See* Wright, Miller & Cooper, 14C Fed. Prac. & Proc. Juris. 3d § 3727, (West 2002); *See also Sun Buick, Inc. v. Saab Cars USA Inc.,* 26 F.3d 1259 (3rd Cir. 1994)(noting in dictum that the federal officer statute, unlike the general removal statute, is to be broadly construed).

The only matter to be determined is whether Kaydon's Notice of Removal sets forth sufficient facts as to support removal, again keeping in mind the whether Kaydon can succeed as to the merits of the defense is not to be determined so long as the allegations are ***plausible***. (emphasis added). Therefore, Armoloy adopts in full Kaydon's response to Plaintiffs' Motion to Remand as though set forth fully herein.

b. Plaintiffs Say That They Are Alleging Only a Manufacturing Defect, But ...

Although Defendant believes that arguments (2) and (3) of Plaintiffs' Motion to Remand are not applicable at this stage, nonetheless Armoloy would show that the although Plaintiffs' characterize their claim only as a manufacturing defect, their characterization does not necessarily make it so. In fact, the background history of this bearing, as recorded in the Navy JAGMAN Report (Exhibit A), suggests that the alleged material discrepancies of the bearing that Plaintiffs complain of were well known to the Navy and had been thoroughly studied in detail and considered by the Navy – and that a decision was made by the Navy to keep the subject bearings in service. This suggests that the Navy, in the exercise of its governmental discretion, had either determined that no deviation from Navy specifications actually existed, or that the Navy had waived any deviation; in essence establishing a new, *de facto* specification.

Defendants submit that the merits of the allegations are not relevant to the question of removal at this stage. However, to illustrate that Plaintiffs' allegations may not be as simple as they would have the court believe; and to support Kaydon's point that there is at least a colorable claim to such a defense; Defendant asks the Court to consider the following sequence of events contained in the Navy JAGMAN Report.

1. Following a mishap on May 9, 1996, the Navy determined that the cause of that crash was failure of the swashplate duplex bearing. (Exhibit A, Findings of fact No. 104 and 113.)

2. During a follow-up investigation of an earlier accident involving a Japanese H-53, it was determined that the swashplate duplex bearing on that helicopter had failed in a manner similar to that of the May 1996 crash. (Exhibit A, Findings of Fact 108 and 114.)

3. On July 1, 1996, the Navy issued Dynamic Control Bulletin (DCB) 131A directing the removal of all H-53E swashplates for a one-time inspection due to manufacturing anomalies. (Exhibit A, Finding of Fact 107.)

4. In addition, the Navy instituted enhanced inspection requirements for bearings manufactured after June, 1996. This resulted in the so called "second generation " – 043 swashplate duplex bearing. (Kaydon Response.)

5. Following a mishap at New River, NC in October, 1996, also attributed to failure of the duplex bearing, approximately 400 individual bearing components were inspected and the chrome plating analyzed. (Exhibit A, Finding of Fact 115 and Enclosure 71, Materials Engineering Report re Swashplate Duplex Bearing S/N 632.) It was noted in that Navy JAGMAN Report that beginning with serial number 471, the chrome plating contained network surface cracking and that there was a correlation between alleged coating anomalies and the higher serial number bearings. Nonetheless, the –043 bearings were left in service by the Navy.

6. The swashplate duplex bearing at issue in this case is a "second question" –043 bearing, serial number 766, manufactured in November, 1996. This bearing

was inspected and approved by both Sikorsky and the United States pursuant to enhanced quality control measures then in effect. (Kaydon Response; Exhibit A, Findings of Fact 119 and 124, and Enclosures 79 & 80; and Exhibit B.)

7. In October 1997, a newly design duplex bearing was introduced with a new production specification and new materials (the –044 and –045 design). The –043 bearings, including the accident bearing, were not recalled. (Exhibit A, Finding of Fact 116 and Enclosure 76.)

8. As of September 10, 2000, a month after this accident, 49% of the bearings in the H-53E fleet were still the –043 bearing. (Exhibit A, Finding of Fact No. 122.)

A manufacturer is not liable for defects in a product when the government is aware of those defects and makes a discretionary decision not to order design changes. *Landgraf v. McDonnell Douglas Helicopter Company*, 993 F.2d 558 (6th Cir. 1993), cert. denied 510 U.S. 993. Although *Landgraf* was concerned with a design issue, the holding is entirely analogous to the present situation.

It is clear from the above, that the "manufacturing defects" alleged by Plaintiffs, were well known to the Navy, had been thoroughly investigated by the Navy, and had been accepted by the Navy. The scope of the Navy's knowledge can been seen in the reports referred to in the JAGMAN Report, particularly Findings of Fact 102 – 123, which outline the history of the –043 bearing. This can also be demonstrated by Exhibit C hereto, a record of bearings examined by Sikorsky for the Navy as part of the Navy's evaluation of the failure of the S/N 632 bearing. (Enclosure 6 to Enclosure 71).

It should also be noted that Defendants were entirely without any say or option in the Navy's exercise of discretion to leave the –043 bearings in service. The choice was the government's alone. Such exercise of governmental discretion is the foundation of Boyles preemption of state law claims against manufacturers of government products, to protect those manufacturers from liability for decisions made by the government.

Defendant believes the evidence will ultimately show that the bearings in question, in fact, met government approved Sikorsky and Navy specifications. However, even if it is assumed for the sake of argument that they did not, as alleged by Plaintiffs, the fact remains that the Navy carefully considered the alleged material discrepancies in the bearings and did not reject or return them; but rather, in their discretion, approved them for continued service.

It is also erroneous to say that an allegation of only a manufacturing defect necessarily takes the case out of the government contractor's defense arena. "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *The first two of those conditions assure the suit is within the area where the policy of the 'discretionary function' would be frustrated ..." Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), emphasis added.

It may be the usual case that a manufacturing defect is unknown to the supplier or the government prior to failure, and the discretionary function of the United States is not implicated, but that is certainly not the case here.

c. Government Involvement – Discretionary Function

Contrary to Plaintiffs assertion, Defendants can show that there was a level of government involvement sufficient to support removal under 28 U.S.C. § 1442(a)(1). Even if the

–043 bearings were "defective" as alleged by Plaintiffs, they were still in service three years later on August 10, 2000 only by virtue of the discretionary decision of an officer of the United States. The alleged "defects" had been discovered, had been investigated and had been considered. Existing bearings were recalled and inspected. Quality assurance processes had been enhanced. A comprehensive review of hundreds of bearing components (encompassing the serial number range of the accident bearing) revealed the existence of what Plaintiffs now allege to be a manufacturing defect. A new design had been introduced, yet the –043 bearing, S/N 766, at the discretion of the Navy, continued in service.

In the last technical investigative report on this accident, the Navy states that the root cause of the swashplate duplex bearing failure is unknown. (Exhibit A, Enclosure 93.) The only evidence of the condition of the accident bearing is that it had some of the same material indications similar to findings on past bearings. (Exhibit A, Enclosure 87.) The only evidence to date indicated that the condition of this bearing is the same as the condition of the bearings previously considered by the Navy. Accordingly, to the extent any of the complained of anomalies existed, they were known to and had been accepted by the Navy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants The Armoloy Corporation, Armoloy of Illinois, Inc. and Investment Holdings, Inc.'s Brief in Opposition to Plaintiffs' Motion to Remand has been forwarded to the following by certified mail, return receipt requested, on this the 30th day of August, 2002.

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EXHIBITS
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